

DOCKET FILE
ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY
MM Docket No. 92-122

In re Application of

CALVARY File No. BRED-891103UA
EDUCATIONAL
BROADCASTING NETWORK, INC.

For Renewal of License
of Station KOKS(FM)
Poplar Bluff, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1994;

Released: April 13, 1994

By the Review Board: MARINO (Chairman),
BLUMENTHAL and GREENE.

1. Pursuant to our Memorandum Opinion and Order (MO&O),¹ released February 3, 1994, the Board has before it (1) the Response Of Calvary Educational Broadcasting, filed March 7, 1994;² and (2) the Mass Media Bureau's Comments On [Calvary's] Response, filed March 22, 1994. Upon examination of the foregoing pleadings, and for the reasons outlined below, the Board is constrained to invite a further reply to the Bureau's March 22 Comments.

BACKGROUND

2. The history of this proceeding is fully set out in the extensive *Initial Decision*, 8 FCC Rcd 4789 (Chief ALJ 1993) (*I.D.*), and encapsulated in our prior MO&O, both of which are incorporated by reference. Suffice it for instant purposes that, no sooner had it begun transmitting on November 6, 1988, both the new station (KOKS) and the FCC began receiving complaints of "blanketing interference" to other radio and television signals from individuals who lived within approximately 2.5 miles of the new FM station. That station, including tower and transmitter, had been built on the residence/property of Calvary's principals

Mr. and Mrs. Donald Stewart. The complaints, which eventually numbered more than 200, were received from individuals apparently entitled to abatement -- at the licensee's expense -- of "blanketing interference" to certain types of pre-existing signals afforded protection (albeit subject to limitations) under Sec. 73.318 of the Commission's rules, 47 CFR § 73.318.³ See, e.g., *Entertainment Communications, Inc.*, FCC 94-56, released March 22, 1994.

3. While actively abetted by FCC Field Office advice and a local broadcast engineer, Calvary readily admitted at hearing that it had neither the technical nor financial resources to effect complete compliance with § 73.318. Indeed, once this case was designated for hearing in 1992, Calvary ceased all efforts to come into accord with the rule; and, so far as we are aware, no further efforts have been made to date. Notwithstanding, the *I.D.* granted KOKS a short term (1-year) renewal, conditioned upon a prescribed course of compliance measures. Calvary filed no exceptions; the Bureau took many exceptions, particularly to the Chief ALJ's conclusion that Calvary had not misrepresented or lacked candor in periodically reporting that it had satisfied numerous, specific interference complaints that had been lodged.

4. Upon its review of the record and the pleadings, the Board found that *even if* Calvary were to be absolved under the "truthfulness" issues, we were in agreement with the Bureau that renewal would not serve the public interest in the absence of evidence that Calvary now had the resources to come into compliance with the rule, and in the full manner implied in the *Hearing Designation Order*. Thus, our prior MO&O required from Calvary two discrete showings, to wit:

- (1) a written showing of the measures it proposes to take to come into full compliance with § 73.318, including a detailed time schedule of proposed actions; and (2) a written showing of the licensee's finances sufficient to demonstrate that it possesses the resources necessary to achieve full compliance with § 73.318.

CURRENT PLEADINGS

5. *Calvary's Response*. The licensee's instant pleading again concedes that, from the very start, the Stewarts were sorely bereft of the financial resources necessary to comply

¹ That prior MO&O is reported at 9 FCC Rcd 575 (Rev. Bd. 1994).

² Without objection from the Commission's Mass Media Bureau, the Board granted Calvary's February 17, 1994 Motion For Extension Of Time to file its Response to our prior MO&O. (Letter to Joseph E. Dunne, III from Allan Sacks, Chief for Law, February 23, 1994.)

³ A major misunderstanding (or disagreement) suffusing this entire issue of "blanketing interference" has been, from the out-set, whether § 73.318 here protected the signal of Channel 6, emanating from WPSD-TV, Paducah, Kentucky, a distant signal to which many (perhaps the majority) of the KOKS interference complaints were directed. Calvary had claimed, in its exceptions to the *I.D.*, that it was not until the issuance of the

Hearing Designation Order, 7 FCC Rcd 4037 (1992), that it was advised that the rule required protection -- even beyond the Grade B contour -- of that Paducah TV signal by KOKS. Not only did the Bureau not dispute that assertion, the underlying record holds an April 1990 epistle to KOKS from the FCC that states the agency has made "no final determination in this [KOKS] case concerning the types of service interruptions that fall within the ambit of the Commission's rules, 47 CFR § 73.318." However, as indicated in our prior MO&O (at ¶ 10), the full Commission issued the controlling *Designation Order*; the Board, therefore, believes itself bound by that *Order's* inclusion of the signal of WPSD-TV in the ambit of the pertinent rule.

with § 73.318.⁴ They also repeat that they "were ignorant of the technical rules involved in blanketing interference, and how difficult it would be to resolve them." Response at 16. (Indeed, when they put the station on the air, they did not possess -- *as compulsory* -- even a copy of the FCC's rules. See MO&O at ¶ 3.) The licensee pleads:

Calvary is a non-profit organization. It depends on the contributions of its supporters for its income. Since we began operating the station we have always remembered that, and we have tried to be good stewards of the donations entrusted to us. We have tried to be good stewards by not spending the donations sent to us if we didn't have to. This proceeding has shown us that, in this instance, being a good steward means satisfying the complaint *if the costs are not outlandish. Good stewardship means doing whatever is necessary to keep the station's license.*

Response at 16 (emphasis added).⁵

6. Nevertheless, Calvary has here submitted several exhibits that propose the equipment it might require for its "Compliance Program," and the engineering assistance it hopes to employ to effect that program. Response at 1-4. Its "best" estimate of the cost of such a program is \$45,642.50. *Id.*, at 4. Additionally, it claims it will mail to "[e]very complainant noted as being within the blanketing contour in the Commission's October, 1990 letter" its own new missive asking as to any KOKS-caused interference and offering to resolve such, to the degree required by the rule. See *id.*, at 7-9.⁶ "Implementing the [KOKS] Compliance Program will take at least 120 days, and that will be rushing it." Response at 12.

7. As for the financing of the above-described program, Calvary proffers a bank letter of February 25, 1994 agreeing to increase an existing \$18,233 Stewart loan by an additional \$50,000 (altogether \$68,233), provided that (1) the Stewarts collateralize any such loan with a deed of trust on the real estate upon which KOKS is located and a

second deed of trust on their ~~house~~, as well as on all KOKS equipment; and (2) the Stewarts also show proof of Title Insurance and the absence any liens on the foregoing assets. See Response, Exh. E (Peoples Bank of Wayne County). In that regard, it is asserted that "Calvary has no current obligations in excess of \$500," Response at 4; the Stewarts hope to pay off the loan(s) with listener donations, see *id.*, at 16. 8. *Bureau Comments.* Without withdrawing any of its original exceptions to the *I.D.*, Comments at 2 n.2, the Bureau counters that although -- "on their face" -- Calvary's technical proposals seem sufficient, the Bureau perceives several critical flaws in the licensee's response. First, whereas Calvary vows to address the interference complaints "noted... in the Commission's October 1990 letter" (see *supra* ¶ 6), the Bureau infers that Calvary's estimate of remedial treatment of "no more than 120 homes" does not appear to contemplate elimination of interference to the reception of TV Channel 6, and hence finds the licensee's proposal inadequate, especially anent the cost estimates. Second, the Bureau complains that Calvary has not made sufficient provision to reimburse complainants who undertook to eliminate the interference from KOKS at their own expense. But, third, the Bureau interposes a transcendent obstacle: while it suffers, *arguendo*, Calvary's assertion that it has no current financial obligations in excess of \$500, the Bureau has appended a farrago of private as well as local government liens and judgments totaling tens of thousands of dollars against the Stewarts and/or their farming businesses. Moreover, the Bureau's appendix reveals a number of recorded "Notice of Federal Tax Lien[s]," the latest dated January 9, 1994; these federal liens alone total over \$300,000. See Comments, Attachment B. Withal, "the Bureau believes that the existence of the federal tax liens is enough of a threat against their home to cast doubt on Calvary's ability to carry out its compliance program." Comments at 7.⁷ In light of its observations, the Bureau repeats its call for a denial of license renewal. *Id.*, at 8.

⁴ Calvary states:

Since the station went on the air, the station's financial resources have been very limited, we have never had much cash on hand to deal with these problems. We were always looking at a bare cupboard and hoping that contributions would come in to cover expenses.

Response at 16. It further posits (*id.*, at 18):

We also believe that even if the Mass Media Bureau agrees that our Compliance Program is adequate, it will probably also question why Calvary didn't adopt such a program sooner. The answers to that question are numerous. The first is obvious and is noted above--Calvary has been chronically starved for funds.

⁵ In that same vein, it later laments:

Calvary, when the its [sic] application was designated for hearing, was faced with the choice of either defending its license against charges that it misrepresented facts to the Commission, as well as didn't comply with the blanketing rule, or trying to comply with the blanketing rule. It did not have the financial or personnel resources to do both.

At best it would have been condemned to the worst of all possible worlds -- a weak defense and a marginal and ineffective compliance program. Calvary should not be condemned for not doing what it clearly did not have the resources or capacity to do.

Id., at 21.

⁶ Calvary also believes that cable service "seems to cure" TV interference; it, thus, promises to pay any complainant whose TV interference cannot be eliminated with the equipment proposed in its general "compliance program" for "a year's subscription to the basic tier of cable service, plus any installation charges." See Response at 9-11. In rejoinder to the Bureau's position (transmitted informally, we presume) that any cable subscription payments should not be limited to 1 year, Calvary objects to an open-ended commitment until that complainant has "died or moved." Compare *id.*, at 10-11 with Comments at 5-6.

⁷ In view of the plethora, and substantial dollar amount, of the liens and judgments the Bureau itself has purposively supplied, it is unclear why the Bureau says that Calvary's claim of no current obligations in excess of \$500 "may literally be true." See Comments at 7. We trust that the reply that we herein below solicit from Calvary will clarify this matter.

DISCUSSION

9. Calvary is correct that our *MO&O* did not provide "an opportunity to respond to the Mass Media Bureau's comments...." Response at 15. This may have been improvident, but the Board could not anticipate that the pleadings we sought would disclose the significant and material factual questions raised as a result. Since we did not invite a reply to any Bureau comments to Calvary's response, we must now demand a reply that fully answers the three basic matters interjected by the Bureau. Calvary must reply, directly and unambiguously, to the questions of whether (1) its "Compliance Program" is intended to satisfy *all* covered first-year complaints, including those related to TV Channel 6; (2) its "Program" is intended to reimburse those complainants who were entitled to such under § 73.318; and (3) its estimate of \$45,642 was intended to encompass those two items, and confirm where in its submitted "Program" these were delineated (if they were). Further, inasmuch as Calvary's entire "Program," as here presented, depends on a \$50,000 increase on an extant bank loan which, in turn, is contingent on the absence of liens on *all* of the specified Stewart assets, Calvary's reply must include (1) evidence of the status of each and every lien and judgment appending Bureau Comments, Attachment B (as well as any other similar potential encumbrances); and (2) a written declaration from Calvary's proposed lender listing -- specifically by claimant, date and dollar amount -- any recorded liens and judgments and stipulating that any such claims would have no impact whatever on the immediate \$50,000 loan to Calvary.⁸ Again, despite the licensee's multiple admissions that, *ab initio*, it did not have the finances to meet the Commission's technical rules, no financial issue, *per se*, has been added or is here being tried.⁹ Our sole instant purpose is to determine, "truthfulness" issues aside for the moment, whether a short-term renewal (such as that proposed in the Chief ALJ's *I.D.*) would likely result in expeditious compliance with the Commission's technical rules, all of the unique circumstances here considered. Inasmuch as Calvary's prime defense for noncompliance is, and from 1988 forward has been, its lack of finances, then the *technical* issue inextricably turns on the licensee's present fiscal resources.

10. ACCORDINGLY, IT IS ORDERED That Calvary Educational Broadcasting Network, Inc. SHALL FILE within twenty (20) days of the release of this *Memorandum Opinion and Order*, the written documentation specified in paragraph 9 above.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

⁸ Although, as we reiterate below, there is no financial issue against Calvary, we do note in passing recent cases where, despite outstanding liens or judgments against an applicant, the Commission declined to add a financial issue because the proposed lender evinced both awareness of the obligations and a reaffirmation of its earlier commitment. See, e.g., *Eve Ackerman*, 8 FCC Rcd 4205, 4206 (1993); *Liberty Productions*, 8 FCC Rcd 4264, 4265 (1993). Compare, *Ackerman* at 4206 n.9 (citing cases where issue added when liens and/or judgments were of major magnitude, i.e., \$200,000 and above). Compare also *Capitol City Broadcasting Co.*, 8 FCC Rcd 1726, 1737 (Rev. Bd. 1993)(concurring statement concerning larger policy regard-

ing substantial federal tax liens against applicant) *with id.*, 8 FCC Rcd 8478 (1993)(case remanded on other financial issue based on purported real estate value financing of the station).

⁹ The Commission's applicable financial standard, implementing 47 U.S.C. § 308(b), is that a license applicant have "sufficient capital to construct the station and then operate the station for 90 days...." See *Financial Qualifications Standards*, 72 FCC 2d 784 (1979). Presumably, Calvary made the requisite "showing" when it applied. *But cf.* 47 U.S.C. § 312(a)(2) (Comm'n can revoke license "because of conditions... which would warrant it in refusing to grant a license or permit on an original application.")